Supreme Court, U.S.
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No 08-748

117 (2) In The

Supreme Court of The United States

VIVIAN L. HAUSCH,

Petitioner,

- against -

GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT,

Respondent.

Petition for a Writ of Certiorari to the
New York State Court of Appeals

BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

By order of the Appellate Division, Second Department, dated and entered on October 15, 2004, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding against VIVIAN HAUSCH, an attorney and counselor-at-law, on the basis of a July 19, 2004 petition containing eight charges of professional misconduct. The Court's order further referred the issues raised by the petition and any answer thereto to the Hon. Lawrence J. Tonetti, as Special Referee, "to hear and report."

The Committee's July 19, 2004 petition contained eight (8) charges, six of which were predicated upon appellant Hausch's alleged misconduct in response to zoning code enforcement efforts regarding the use and occupancy of 99 Main Street, Tuckahoe, New York – a storefront office owned by appellant Hausch's client *P&N Tiffany Properties, Inc.* and litigation that resulted therefrom. The remaining charges arose from appellant Hausch's failure to comply with requests, made by the respondent Committee during the course of it's investigation of those matters, that she provide specific information regarding her client and its corporate structure, as well as a request that she come to the respondent Committee's office and give testimony under oath regarding the foregoing matters. Appellant Hausch submitted an answer, dated November 30, 2005, wherein she denied the charges of professional misconduct alleged therein and proffered various legal and factual explanations in defense of her alleged misconduct.

Once issue was joined, and preliminary issues were addressed, the Special Referee conducted hearings in the disciplinary matter, after which both parties were permitted to submit post-hearing memoranda. In its "Proposed Findings," the respondent Committee conceded that it could not prove Charges Four, Five, Six, and Seven of the petition as drafted, and that said charges should therefore be withdrawn and/or dismissed. The Special Referee thereafter adopted the proposed report of the respondent Committee, and submitted his findings in a November 14, 2005 report to the Appellate Division, Second Department. Therein he concluded that Charges One, Two, Three, and Eight of the petition should be sustained.

The parties thereafter each moved to confirm and/or disaffirm as their respective interests dictated. By order of the Appellate Division, Second Department, dated and entered on November 21, 2006, that Court found that Charges One, Two, Three and Eight of the petition had been correctly sustained, and that appellant Hausch had engaged in professional misconduct, including:

(a) conduct prejudicial to the administration of justice and/or which adversely reflected upon her fitness as a lawyer on the basis of her failure to cooperate with the lawful directives of the Village of Tuckahoe, and

(b) additional conduct prejudicial to the administration of justice and/or which adversely reflected upon her fitness as a lawyer on the basis of her failure to cooperate with the lawful demands of the respondent Committee and its efforts to investigate her conduct with respect to

the Village of Tuckahoe, and

(c) disregarding and/or counseling her client to disregard one or more rulings made by a tribunal in the course of a proceeding, and

(d) conduct involving dishonesty, fraud, deceit, or misrepresentation on the basis of material misrepresentations she made to the respondent Committee and/or other local and state government authorities regarding the location of her law office.

Based upon these findings, the Appellate Division, Second Department ordered that appellant Hausch be suspended from the practice of law for a period of six (6) months, effective December 21, 2006. *Matter of Hausch*, 36 A.D.3d 141; 825 N.Y.S.2d 109; 2006 N.Y. App. Div. LEXIS 13859 (2d Dep't, 2006)(see Appellant's Appendix E).

On December 14, 2006, the New York State Court of Appeals declined to sign an Order to Show Cause presented by the appellant Hausch as part of her application for a stay of the November 21, 2006 Opinion and Order of the Appellate Division, Second Department. Appellant Hausch thereafter filed an application seeking leave to appeal to the New York State Court of Appeals on the same date. This application to the New York State Court of Appeals for permissive leave to appeal was denied in an Order dated January 9, 2007. *Matter of Hausch*, 8 NY3d 801, 828 NYS2d 292 (NY, 1/9/07).

On June 22, 2007, appellant Hausch moved before the Appellate Division, Second Department for reinstatement to the practice of law at the conclusion of her six-month suspension. The respondent Committee immediately filed an "Affirmation in

Response," citing the fact that, among other things: (a) appellant's reinstatement application was not in the form required by 22 NYCRR §691.11, (b) she had failed to provide copies of her state and federal income tax returns for the period of her suspension, and (c) failed to provide proof that she had completed sufficient continuing legal education credits required under 22 NYCRR §691.11. However, it took no position upon whether or not appellant's petition for reinstatement should be granted.

Upon information and belief, the Clerk of the Appellate Division, Second Department thereafter rejected appellant Hausch's June 22, 2007 papers on the basis of her failure to follow the required format specified in 22 NYCRR §691.11. The respondent Committee's "Affirmation in Response" was also returned by the Court at or about the same time. However, appellant Hausch, having been served with a copy of the respondent Committee's "Affirmation in Response," thereafter served and filed a "Supplemental Affidavit," in what appeared to be an effort to comply with the format dictated by 22 NYCRR §691.11.

Once again, the respondent Committee prepared a response, which it denominated as a "Supplemental Affirmation in Reply," wherein it again highlighted the various ostensible deficiencies in appellant Hausch's latest submission[1], but continued to take no position

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[1] Including the filure to provide tax returns, proof of completion of required Continuing Legal Education courses, or any other explanation regarding a judgment for unpaid taxes entered against her client *P&N Tiffany Properties* by the NYS Tax Commission. Appellant's role in corporate structure of *P&N Tiffany Properties* was one of the issues appellant Hausch steadfastly refused to provide any information about during the

upon appellant Hausch's application for reinstatement itself. Upon information and belief, appellant Hausch's "Supplemental Affidavit" was again deemed unsuitable for filing and also returned to her by the Clerk of the Appellate Division. However, the respondent Committee's "Supplemental Affirmation in Reply" was not returned and was, instead, upon information and belief, retained in the Appellate Division, Second Department's docket file for future reference.

Appellant Hausch thereafter filed yet another motion for reinstatement, dated July 13, 2007, with the Appellate Division, Second Department. Appellant Hausch's July, 2007 application was supported by an attached affidavit that (a) asserted compliance with the CLE requirements by virtue of her having completed a CLE course on July 11, 2007, but (b) was otherwise essentially the same "Supplemental Affidavit" previously rejected by the Appellate Division, Second Department.

On July 16, 2007, the respondent Committee advised the Clerk of the Appellate Division, Second Department that the concerns cited in its previously submitted and retained "Supplemental Affirmation in Reply" were equally applicable to both of appellant Hausch's two most recent submissions and that, therefore, no new papers would be submitted in response to the July 13, 2007 motion at that time.

On or about September 29, 2007, appellant Hausch served and filed a "Second Supplemental Affidavit" with the Appellate Division, Second Department, wherein she again petitioned that court for reinstatement on essentially the same petition, but now sought a waiver of the requirement that she

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course of the underlying disciplinary proceeding.

submit copies of her tax returns with that application. The respondent Committee prepared and submitted an "Affirmation in Reply," dated October 9, 2007, wherein it reiterated the same concerns expressed earlier and submitted that appellant Hausch should be held to the same standard of compliance with 22 NYCRR §691.11 as every other attorney reinstatement applicant. However, once again, the respondent Committee took no position upon appellant Hausch's application for reinstatement, relying instead upon the Court's discretion to determine it in the interests of justice.

On November 21, 2007, the Appellate Division, Second Department issued a "Decision and Order on Motion for Reinstatement" wherein it formally denied appellant Hausch's application for a waiver of the requirement that she submit her tax returns and held her application for reinstatement in abeyance for a period of 30 days pending her submission of same. *Matter of Hausch,* NYSlipOp 84168(U) (2d Dep't, 2007) (see Appellant's Appendix D).

On December 18, 2007, appellant Hausch filed yet a "Third Supplemental Affidavit," with the Appellate Division, Second Department, wherein she asserted that proof of filing was all that the rule required and claimed[2] that she had documented her proof of same with respect to her federal tax returns. Once again, the respondent Committee submitted yet another "Affirmation in Reply," dated December 26, 2007, wherein it again highlighted its ongoing concerns, including the similarity between appellant Hausch's conduct in this matter and the conduct that led to her

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[2] In fact, all respondent did was provide proof that she had requested proof of filing of her returns. No proof of actual filing at was provided to the court.

suspension from practice, but otherwise took no position upon respondent's application.

On January 2, 2008, the Clerk of the Appellate Division, Second Department advised appellant Hausch in writing that, *inter alia*, compliance with that Court's November 21, 2007 order and 22 NYCRR §691.11 would require the production of copies of her tax returns and not mere proof of filing (see Appellant's Appendix F). On January 9, 2008, appellant Hausch submitted a "Fourth Supplemental Affidavit," wherein she advised the court that *"regrettably, I cannot submit my income tax returns to the court in order to be reinstated as a lawyer."* In a "Decision and Order on Motion for Reinstatement," dated February 22, 2008, appellant Hausch's application for reinstatement was finally denied by the Appellate Division, Second Department. *Matter of Hausch*, 2008 NYSlipOp 64537(U)(2d Dep't, 2008)(see Appellant's Appendix C).

On April 10, 2008, appellant Hausch filed a "Motion for Leave to Appeal" with the New York State Court of Appeals, seeking permissive leave to appeal from the February 22, 2008 Order of the Appellate Division, Second Department. The respondent Committee opposed this application in an "Answer in Opposition to Motion for Permissive Leave to Appeal," dated April 18, 2008. The New York State Court of Appeals in an Order dated and entered June 10, 2008 thereafter denied appellant Hausch's application for permissive leave to appeal. *Matter of Hausch*, 10 N.Y.3d 713; 891 N.E.2d 308; 861 N.Y.S.2d 273; 2008 N.Y. LEXIS 1507;2008 NYSlipOp 74142 (NY, 2008)(see Appellant's Appendix A).

On July 10, 2008, appellant Hausch moved for re-

argument of the June 10, 2008 decision by the New York Court of Appeals and the respondent Committee thereafter filed opposition papers, dated July 18, 2008. Appellant Hausch's motion for reargument was thereafter denied in an Order, issued by the New York State Court of Appeals, dated and entered September 9, 2008. *Matter of Hausch*, 11 N.Y.3d 760; 894 N.E.2d 1194; 864 N.Y.S.2d 804; 2008 N.Y. LEXIS 2658; 2008 NYSlipOp 74142 (NY, 2008)(see Appellant's Appendix B).

ARGUMENT

POINT I

Appellant Has Not Presented A Question Appropriate For This Court's Review

While couched in constitutional allegory, appellant Hausch seeks nothing more than appellate review of the Appellate Division, Second Department's refusal to reinstate her to the practice of law on her own stubbornly dictated terms when she has failed to meet her burden of proving her character and fitness under the expressly stated requirements of 22 NYCRR §691.11.

In the first of the two "Reasons for Granting the Writ" proffered by appellant Hausch. she endeavors to persuade this honorable Court that her right to privacy under the United States Constitution has been unjustly infringed 22 NYCRR §691.11 where it requires copies of her tax returns in her application for reinstatement to the practice of law. However, 26 USC §6103 did not create and does not embody the sweeping, constitutionally guaranteed, absolute, right

to privacy of all income tax returns and taxpayer information that appellant would have this honorable Court believe.

In fact, the confidentiality and non-disclosure obligations in that section apply to only the Internal Revenue Service ("IRS") and not the individual taxpayer or other private parties. Moreover, the provisions of 26 USC §6103 itself contain numerous exceptions to the statutory confidentiality embodied therein, each of which permits the Internal Revenue Service to reveal that information to various federal and state agencies under a variety of conditions and circumstances. What 26 USC §6103 does not contain, however, is any provision that would bar an individual taxpayer from voluntarily providing such information when requested to do so.

Consistent with this view, it has been repeatedly held that tax returns in the hands of the taxpayer are not privileged and therefore discoverable. In *St. Regis Paper Company v. U.S.*, 368 U.S. 208, 219, 82 S.Ct. 289 (1961), this honorable Court held that tax returns in the taxpayer's possession were discoverable in litigation. In *Heatherman v. USDC For The Central District*, 503 F2d 1032 (9th Circuit, 1974), the 9th Circuit Court of Appeals again held that 26 USC §6103 applies only to the release of tax information by the government while concluding that tax returns in the taxpayer's possession are not privileged and not subject to its restrictions. Similarly, in *Maggio v. Hynes*, 423 F.Supp 144 (EDNY, 1976), the United States District Court for the Eastern District of New York held that even tax returns in the possession of the taxpayer's accountant are not privileged or barred from discovery by 26 USC §6103 while finding no merit

to the taxpayer's claim that discovery of the returns violated the taxpayer's rights to privacy and/or freedom from unreasonable search and seizure under the United States Constitution.

Clearly, the requirement that an attorney seeking reinstatement submit copies of his/her tax returns does not invade any constitutionally protected right to privacy. In the instant matter, 22 NYCRR §691.11 requires only that attorneys (i.e. the taxpayers) seeking reinstatement provide copies of their tax returns for the period during which they were suspended or disbarred. Since the confidentiality imposed by 26 USC §6103 applies only to the IRS, and 22 NYCRR §691.11 seeks only tax returns and information directly from the taxpayer, there is neither a constitutional nor statutory prohibition to this rule.

Moreover, the requirement that attorney reinstatement applicants provide tax returns at some point in the reinstatement process is hardly unique. Upon information and belief, outside of New York, at least thirteen (13) other states[3] require reinstatement applicants to submit tax returns for use in assessing the character and fitness of disciplined attorneys seeking reinstatement to the bar. Within New York, the Appellate Division, First Department, requires that tax returns must be provided by attorneys seeking reinstatement after a period of suspension greater than six (6) months while the Second, Third, and Fourth Appellate Departments each require the

[3] Arizona, California, Indiana, Louisiana, Massachusetts, Maryland, Pennsylvania, Oregon, Oklahoma, Rhode Island, Utah, Virginia, and Wisconsin.

production of tax returns as part of any application for reinstatement, regardless of the length of the applicant's suspension. See 22 NYCRR §603.14 [1st Dep't]; 22 NYCRR §691.11 [2d Dep't]; 22 NYCRR §806.12 [3d Dep't]; and 22 NYCRR §1022.28(3) [4th Dep't]; 22 NYCRR §603.14 [1st Dep't], 22 NYCRR §691.11 [2d Dep't]; 22 NYCRR §806.12 [3d Dep't]; and 22 NYCRR §1022.28(3) [4th Dep't].

This *de minimus* difference does not, however, rise to the level of unequal treatment suggested by appellant. Instead, it merely reflects the fact that, in New York, the four Appellate Divisions of the New York State Supreme Court have exclusive jurisdiction over attorney disciplinary matters within their respective departments. See NY CLS Jud §90(2); see also *Mildner v. Gulotta*, 405 F.Supp 182, 188 (EDNY 1975), affirmed 425 US 901 (USNY 1976). Since reasons of policy regarded as significant by one Appellate Department in their effect on the conduct of attorneys may not prevail in another Department, *because* of differing conditions in those jurisdictions, it has been held that the rules governing the conduct of attorneys licensed to practice law before those courts may vary. Nothing in the Constitution or statutes guarantees that different jurisdictions must adhere to identical procedures. *Matter of Walker*, 113 AD2d 254, 356 (1st Dep't 1985).

Nor is such a requirement unreasonable where an attorney's character and fitness to practice law is at issue. A special relationship exists between the attorney and the court that grants him or her a license to practice law before it. *"No other body is as well qualified or as interested in determining whether an attorney is qualified to practice law."* See *Javits v.*

Stevens, 382 F. Supp. 131, 141 (S.D.N.Y. 1978). Thus, state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers. *Erdman v. Stevens*, 458 F2d 1205 (2d Cir., 1972) *Cert. denied* 409 U.S. 889, 93 S. Ct. 126 (1972). What appellant Hausch fails to grasp is that it is the Appellate Division, and not she, who determines what is required to establish an attorney's character and fitness to engage in the practice of law.

Where the character and fitness of an attorney to practice law is at issue, tax returns and the information they contain provide the Courts with substantial information about the applicant's conduct during the period of suspension, including but not limited to: (a) how the applicant has earned a living, (b) the completeness and timeliness of the applicant's compliance with any income reporting and tax payment obligations, and (c) whether or not the applicant has held oneself out as an attorney to the government or other third parties, during the period of suspension or disbarment. Such information also affords corroboration and confirmation of other claims made by the disciplined attorney applicant as part of their reinstatement application, a particularly valuable tool where the applicant, like appellant Hausch, has been previously found guilty of conduct prejudicial to the administration of justice and/or conduct involving dishonesty, fraud, deceit, or misrepresentation.

Ultimately, appellant Hausch grossly misleads this honorable court where she suggests that attorneys are forced to choose between giving up their

constitutional rights and giving up their rights to make a living. What appellant Hausch fails to grasp is that the ability to practice law in the State of New York is not a right, but rather a privilege, burdened with conditions, surrounded with a public interest, and vested with a private responsibility. *Theard v. U.S.*, 354 U.S. 278 (1957), citing *Matter of Rouss*, 221 N. Y. 81, 84, 116 N. E. 782, 783; See also: *Matter of Dondi*, 63 N.Y.2d 331 (1984); *Matter of Capoccia*, 59 N.Y.2d 549, 552-553 (1983); *Matter of Wysell*, 10 AD2d 199 (1st Dep't, 1960).

If appellant Hausch wishes to regain the privilege of practicing law in New York State, she must first satisfy the Court by clear and convincing evidence that she has both complied with the provisions of the order suspending her and that she now possesses the requisite character and general fitness to resume the practice law. 22 NYCRR §691.11(c)(1). The public must be protected *"in its reliance upon the integrity and responsibility of the legal profession."* *Matter of Wysell*, supra, citing *Matter of Gould*, 4 AD2d 174,175.

Yet, appellant Hausch has utterly, completely, and totally failed to meet that burden, even after multiple opportunities were afforded to her by the reviewing court and her obligations were repeatedly and clearly explained to her. The denial of her reinstatement application is the direct result of her own deliberate, knowing, willful and contumacious refusal to undertake the necessary acts, provide the required information, and follow the procedures required to persuade the Court of her fitness to practice law. She should not now be heard to complain about the denial of that relief when such was directly

engineered by her own stubbornly foolish actions.

There is no basis upon which appellant Hausch's instant petition can or should be granted and her petition must therefore be denied.

POINT II

APPELLANT IS TIME BARRED FROM SEEKING CERTIORARI ON THE BASIS OF HER SECOND REASON

In the second of appellant's "Reasons for Granting the Writ," she endeavors to reprise and relitigate the very same issues she failed to prevail on in the underlying disciplinary hearing in this matter.

Virtually all of these issues (with the exception of the grossly scandalous and totally baseless accusations she makes against the petitioner's staff counsel) were previously the subject of appellant's December, 2006 application for permissive leave to appeal to the New York State of Court of Appeals. The New York State Court of Appeals in its order of January 9, 2007 denied that application. *Matter of Hausch*, 8 NY3d 801, 828 NYS2d 292 (NY, 1/9/07).

Accordingly, appellant was already time barred from petitioning for further appellate review of that determination at the time she began the reinstatement process. Moreover, while those issues were not raised, at any time, during the course of appellant's failed attempt at reinstatement, she nevertheless included them in her March, 2008 application to the New York Court of Appeals for leave to appeal from the order denying her petition for reinstatement. In its response to that application, the respondent Committee argued

that the January 9, 2007 order was *res judicata* therein and that appellant was therefore estopped by virtue thereof from again litigating those same arguments and issues in her latest application for permissive leave to appeal.

By trying to renew an already time-barred claim, appellant seeks to deceive this honorable Court into granting certiorari on the basis of issues and claims that she would not otherwise be legally able to argue.

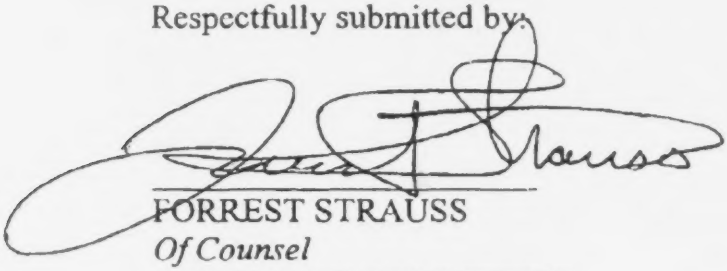
Accordingly, respondent-appellant's application on these grounds should be denied in its entirety.

CONCLUSION

Appellant Hausch has failed to articulate any grounds that would justify her petition for a Writ of Certiorari to this honorable Court herein. Accordingly, it is respectfully submitted that appellant Hausch's application should be dismissed in its entirety.

Dated: January 12, 2009
White Plains, New York

Respectfully submitted by:



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